

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 CANDYCE L. SHELLMAN,

9 Plaintiff,

10 v.

11 MICHAEL J. ASTRUE, Commissioner of  
Social Security,

12 Defendant.

Case No. C11-1203-RAJ-BAT

**REPORT AND  
RECOMMENDATION**

13 Candyce Lynn Shellman seeks review of the denial of her Disability Insurance Benefits  
14 application. Ms. Shellman contends the ALJ erred by (1) failing to include functional limitations  
15 caused by hand tremors in assessing her residual functional capacity at step-four, and (2)  
16 incorrectly assessing her credibility. Dkt. 13. As discussed below, the Court recommends the  
17 case be **REVERSED** and **REMANDED** for further administrative proceedings.

18 **BACKGROUND**

19 Ms. Shellman is currently 59 years old, has an 11th grade education and a dental assistant  
20 technical degree; she has worked as an office and apartment manager, office assistant, telephone  
21 solicitor, patient scheduler, and front office worker.<sup>1</sup> On January 23, 2008, she applied for  
22

23 \_\_\_\_\_  
<sup>1</sup> Tr. 31, 119, 138.

benefits, alleging disability as of July 31, 2007.<sup>2</sup> Her application was denied initially and on reconsideration.<sup>3</sup> After conducting a hearing on January 28, 2010, the ALJ found Ms. Shellman not disabled.<sup>4</sup> As the Appeals Council denied Ms. Shellman's request for review, the ALJ's decision is the Commissioner's final decision.<sup>5</sup>

## THE ALJ'S DECISION

Utilizing the five-step disability evaluation process,<sup>6</sup> the ALJ found:

**Step one:** Ms. Shellman had not worked since July 31, 2007.

**Step two:** Ms. Shellman had the following severe impairments: degenerative disc disease – cervical and thoracic; and mild essential tremor.

**Step three:** These impairments did not meet or equal the requirements of a listed impairment.<sup>7</sup>

**Residual Functional Capacity:** Ms. Shellman could perform sedentary work except due to pain, she could occasionally balance, stoop, kneel, crouch and crawl, climb using ramps or stairs; she could never climb using ropes or scaffolds; she must avoid concentrated exposure to vibration hazards such as machinery and heights.

**Step four:** Ms. Shellman could perform her past work as a patient scheduler, telephone solicitor and front office worker and is therefore not disabled.

Tr. 9-21.

## DISCUSSION

### A. The ALJ's residual functional capacity assessment

The parties agree Ms. Shellman's "mild essential tremor" is a severe impairment. Tr. 14. The parties disagree whether the ALJ properly evaluated the functional limitations caused by this

---

<sup>2</sup> Tr. 119.

<sup>3</sup> Tr. 66, 70.

<sup>4</sup> Tr. 9-25.

<sup>5</sup> Tr. 1.

<sup>6</sup> 20 C.F.R. §§ 404.1520, 416.920.

<sup>7</sup> 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 impairment in assessing Ms. Shellman's residual functional capacity. Ms. Shellman contends  
2 the ALJ erred in finding her tremor caused no limitations. *Id.* at 8 (referring to Tr. 19). The  
3 Court agrees. In assessing a claimant's residual functional capacity, the ALJ must assess all  
4 relevant evidence, including medical reports, and must also consider the limitations and  
5 restrictions caused by the claimant's medically determinable impairments. *See* SSR 96-8p, 20  
6 C.F.R. § 416.945(a).

7 Here the ALJ gave great weight to the opinions of non-examining doctors, Robert  
8 Bernardez-Fu, M.D., and Robert Hoskins, M.D., that Ms. Shellman had "no limitations in the  
9 ability to perform hand manipulations including reaching, handling, fingering or feeling." Tr.  
10 19-20. Based on these opinions, the ALJ found there was no evidence showing Ms. Shellman's  
11 tremors are of such frequency or severity as to prevent her from performing "normal daily  
12 activities." Tr. 20. The ALJ's finding is unsupported.

13 First, in 2005, examining doctor Joyce Mauk, M.D., opined Ms. Shellman's coordination  
14 was affected by "mild to moderate tremor" and that "this will be worse with stress." Tr. 226. An  
15 ALJ should give more weight to the opinion of an examining doctor than to a non-examining  
16 doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another  
17 doctor, an examining doctor's opinion may be rejected only for "clear and convincing reasons."  
18 *Id.* at 830-31. Where contradicted, an examining doctor's opinion may not be rejected without  
19 "specific and legitimate reasons" that are supported by substantial evidence in the record. *Id.* at  
20 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). An ALJ does this by  
21 setting out a detailed and thorough summary of the facts and conflicting evidence, stating his  
22 interpretation of the facts and evidence, and making findings. *Magallanes v. Bowen*, 881 F.2d  
23 747, 751 (9th Cir. 1989).

1 Here, the ALJ failed to explain whether she was accepting or rejecting Dr. Mauk's  
2 opinions that Ms. Shellman had mild to moderate tremors affecting her coordination. Having  
3 given no reasons to reject Dr. Mauk's opinions, the ALJ erred. The ALJ's treatment of Dr.  
4 Mauk's opinions is also fractured. On one hand, the ALJ gave Dr. Mauk some credence by  
5 using her opinions as a reason to reject treating doctor Raj's opinion that Ms. Shelman's tremors  
6 were incapacitating. Tr. 20. On the other hand, the ALJ implicitly rejected Dr. Mauk's opinions  
7 by adopting the non-examining doctors' opinions that the tremors cause no limitations. This  
8 fractured treatment amplifies the ALJ's error in failing to explain why she was rejecting Dr.  
9 Mauk's opinions that the tremors were mild to moderate. The Court notes, too, that to the extent  
10 the ALJ relied on the opinions of the non-examining doctors to reject Dr. Mauk's opinions, the  
11 ALJ erred. The opinion of a non-examining doctor cannot by itself constitute substantial  
12 evidence that justifies the rejection of the opinion of either an examining physician or a treating  
13 physician. *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984).

14 Second, even if the Court disregarded the ALJ's failure to explain why she was rejecting  
15 Dr. Mauk's opinions, the opinions of the non-examining doctors do not support the ALJ's  
16 finding the tremors caused no limitations. Non-examining doctor Robert Hoskins, M.D.,  
17 affirmed the opinion of Disability Examiner Tammy Rollins who in May, 2008 reviewed Ms.  
18 Shellman's medical records. Neither Ms. Rollin's review nor Dr. Hoskin's affirming opinion  
19 discusses or mentions Ms. Shellman's hand tremors. *See* Tr. 245, 283. This stands in contrast to  
20 non-examining doctor Bernardez-Fu's opinion which specifically discussed Ms. Shellman's  
21 tremors. As there is nothing showing Ms. Rollins or Dr. Hoskins were aware of the hand  
22 tremors, considered them, or were in a position to give an opinion as to what limitations the  
23 tremors caused, their opinions do not support the ALJ's finding that the tremors caused no

1 limitations.

2 Non-examining doctor Bernardez-Fu opined there was no evidence showing Ms.  
3 Shellman's tremors "are of such frequency or severity as to prevent her from performing normal  
4 daily activities." Tr. 325. The ALJ relied on this opinion in finding the tremors caused no  
5 limitations. Tr. 20. The problem with this is, without more specificity, the ability to perform  
6 "normal daily activities" do not alone establish a claimant's residual functional capacity. For  
7 instance, a person might be able to do many normal daily activities even with significant fine  
8 motor skill limitations such as writing, working with small parts or delicate items. But while  
9 such a person might have the capacity to perform many "normal" daily activities, that person's  
10 capacity to perform work that required fine motor skills such as rapid and accurate note-taking,  
11 or assembling items with small parts, might be severely limited. Here Dr. Mauk opined Ms.  
12 Shellman's hand tremors affected her coordination and Ms. Shellman testified her tremors made  
13 it difficult for her to write. Tr. 43. Hence, Dr. Bernardez-Fu's opinion the tremors did not  
14 prevent Ms. Shellman from performing "normal daily activities" is not substantial evidence that  
15 her tremors caused no limitations to her ability to work. This error was not harmless because the  
16 type of work the ALJ found Ms. Shellman capable of performing, such as scheduler or front  
17 office worker, would involve writing.

18 **B. Credibility of Ms. Shellman's testimony**

19 Ms. Shellman argues the ALJ improperly discounted her testimony about how her pain  
20 limits her. Dkt. 13 at 11. As there is no indication Ms. Shellman was malingering, the ALJ must  
21 provide "clear and convincing" reasons for rejecting her testimony. *Smolen v. Chater*, 80 F.3d  
22 1273, 1283-84 (9th Cir. 1996). The ALJ may consider "ordinary techniques of credibility  
23 evaluation" including inconsistencies between testimony and conduct, daily activities, work

1 record, and testimony from physicians and third parties concerning the nature, severity, and  
2 effect of the symptoms of which the claimant complains. *Id.*

3 Here, the ALJ discounted Ms. Shellman's pain testimony for two reasons, neither of  
4 which is supported by substantial evidence. The ALJ first discounted Mr. Shellman's testimony  
5 finding it was "not consistent with her actual range of activities." Tr. 18. The ALJ reached this  
6 conclusion based on Ms. Shellman's written "function report-adult" in which the ALJ found Ms.  
7 Shellman was "independent in personal care," prepared meals, did laundry for her husband, and  
8 light household chores, shopped, drove car twice a week, paid bills, visits a senior friend, and  
9 likes to go to the beach. The ALJ concluded the function report showed Ms. Shellman was able  
10 to engage in a wider range of activities than alleged and that her physical conditions was not as  
11 severe as she claimed. Tr. 18. The function report shows otherwise. It shows Ms. Shellman can  
12 perform the activities the ALJ highlighted, but only with significant limitations.

13 For instance, Ms. Shellman stated she could perform, with rest breaks, daily activities  
14 such as running errands, fixing dinner and doing the laundry but only "if I'm not in major pain.  
15 If I am then it's usually a full day of bed treating my pain and sometimes a trip to the doctor or  
16 chiropractor." Tr. 156. She stated she "[tries] to fix lunch and dinner for [my husband] and  
17 wash and dry his clothes. Many days he has to do for himself due to my contending with pain."  
18 Tr. 147. She acknowledged she could go outside and get around but that "if [she] has a migraine  
19 or severe neck pain, [she] can be in bed for a day or a couple of days." Tr. 159. She noted she  
20 could pay bills but it took longer (Tr. 160), that she had trouble sitting for long periods of time  
21 (*Id.*) and that she has missed many social activities due to pain. Tr. 161.

22 By turning a blind eye to these limitations, the ALJ painted a picture of a claimant who  
23 appeared able to function fairly normally and whose pain did not cause significant limitations.

1 The record shows the picture the ALJ painted of Ms. Shellman's range of activities was an  
2 inaccurate or incomplete picture, and that while Ms. Shellman was attempting to perform  
3 "normal" activities of daily living, she was limited in doing so. The ALJ thus erred in  
4 discounting Ms. Shellman's testimony as inconsistent with her "actual range of activities."

5 The ALJ next discounted Ms. Shellman's testimony finding "the objective medical  
6 evidence" does not support her testimony. Tr. 18. Ms. Shellman argues the ALJ "applied the  
7 wrong legal standard" in rejecting her testimony on this basis. Dkt. 13 at 15. An ALJ must  
8 apply a two-step analysis in evaluating a claimant's testimony regarding subjective symptoms  
9 such as pain. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281 (citing *Cotton v. Bowen*,  
10 799 F.2d 1403 (9th Cir. 1986)). First, the ALJ must determine whether there is a medically  
11 determinable impairment that reasonably could be expected to cause the claimant's symptoms.  
12 20 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82. The ALJ found Ms.  
13 Shellman's "medically determinable impairment could reasonably be expected to cause some of  
14 the alleged symptoms." Tr. 17.

15 Once a claimant produces medical evidence of an underlying impairment, as Ms.  
16 Shellman did in this case, the ALJ may not discredit the claimant's testimony as to the severity  
17 of symptoms "based solely on a lack of objective medical evidence to fully corroborate the  
18 alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (en  
19 banc) (citing *Cotton*, 799 F.2d at 1407). Hence, to the extent the ALJ rejected Ms. Shellman's  
20 testimony based on the grounds the objective medical evidence did not corroborate her claims,  
21 the ALJ erred. The Commissioner does not argue otherwise but contends the ALJ properly  
22 evaluated Ms. Shellman's credibility in light of the medical record, citing to SSR 96-7p and 20  
23 C.F.R. § 1529(c)(4). SSR 96-7p requires the ALJ consider the entire case record, including

1 medical records, but reaffirms “an individual's statements about the intensity and persistence of  
2 pain or other symptoms or about the effect the symptoms have on his or her ability to work may  
3 not be disregarded solely because they are not substantiated by objective medical evidence.”  
4 Section 404.1529(c)(4) focuses on how the Commissioner determines the extent to which pain  
5 affects a claimant’s capacity to perform work. That section, however, does not permit the ALJ to  
6 reject a claimant’s pain testimony because the objective medical evidence does not support the  
7 testimony. Rather as noted in § 404.1529(c)(2) the ALJ must:

8           always attempt to obtain objective medical evidence and, when it  
9           is obtained, we will consider it in reaching a conclusion as to  
10          whether you are disabled. However, we will not reject your  
11          statements about the intensity and persistence of your pain or other  
12          symptoms or about the effect your symptoms have on your ability  
13          to work solely because the available objective medical evidence  
14          does not substantiate your statements.

15 Hence while the Commissioner correctly notes the ALJ must consider the entire medical record,  
16 the Commissioner incorrectly implies the ALJ may reject Ms. Shellman’s testimony because the  
17 objective medical evidence does not substantiate her testimony.

18           The Court has also considered whether the Commissioner might be attempting to argue  
19 the medical record contradicts Ms. Shellman’s testimony. The record however does not support  
20 this argument. Rather, the record shows Ms. Shellman has suffered from pain associated with  
21 neck, back and hip problems for many years. Dr. James Prichett found she had significant  
22 degenerative changes in her cervical spine, but not overly severe lumbar and thoracic changes.  
23 Tr. 257. Her EMG studies show mild to severe and very severe elevations (Tr. 214), and her  
thermal studies show mild to severe asymmetry. *Id.* Due to pain, Ms. Shellman sought regular  
treatment including physical therapy, (Tr. 234), chiropractic care (Tr. 246), hip injections (Tr.  
265), medial branch radiofrequency neurotomy (Tr. 269), joint injections (Tr. 271); and branch



1 blocks. Tr. 275. One of her treating doctors, Dr. Jeffrey Garr, M.D., commented Ms. Shellman's  
2 symptoms are not dangerous but that made the comment in the context of whether surgery was  
3 recommended, not whether her condition was minor or that her pain complaints were unfounded.  
4 Tr. 284. To the contrary, Dr. Garr documented in his notes Ms. Shellman's pain complaints and  
5 rather than disregarding the complaints, he began to investigate its causes and made various  
6 treatment recommendations. *See* Tr. 284-96. Dr. Garr's reports that Ms. Shellman medical  
7 condition caused her pain do not stand alone and are repeated by other medical professionals  
8 who treated Ms. Shellman. *See* (Burlington Family Practice) Tr. 299-317; (Dr. George Raj,  
9 M.D.) Tr. 355-65. In sum, as the ALJ failed to give specific findings stating clear and  
10 convincing reasons to reject Ms. Shellman's testimony, the ALJ erred.

11 **C. Remand for benefits or further proceedings**

12 In her opening brief Ms. Shellman requested the matter be remanded for benefits (Dkt. 13  
13 at 2); in her reply she requested remand for further proceedings. Dkt. 16 at 12. The Court may  
14 remand for an award of benefits where "the record has been fully developed and further  
15 administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d  
16 1072, 1076 (9th Cir. 2002). This occurs when: (1) the ALJ has failed to provide legally  
17 sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that  
18 must be resolved before a determination of disability can be made; and (3) it is clear from the  
19 record that the ALJ would be required to find the claimant disabled if he considered the  
20 claimant's evidence. *Id.* at 1076-77. Here, the effect of Ms. Shellman's tremors on her residual  
21 functional capacity is unresolved and Ms. Shellman's credibility must be reassessed. As both of  
22 these issues are for the ALJ to develop and evaluate, the matter should be remanded for further  
23 proceedings.

## CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand, the ALJ should (1) reevaluate the medical evidence regarding Ms. Shellman's tremors and develop the medical record as necessary; (2) reevaluate Ms. Shellman's testimony; (3) reassess Ms. Shellman's RFC; and (4) reassess steps four and five of the sequential evaluation process utilizing a vocational expert as deemed appropriate.

Objections, if any to this Report and Recommendation must be filed and served no later than **March 29, 2012**. If no objections are filed, the matter will be ready for the Court's consideration on March 30, 2012. If objections are filed, any response is due within 14 days after being served with the objections. A party filing an objection must note the matter for the Court's consideration 14 days from the date the objection is filed and served. Responses to objections must be filed no later than 14 days after being served with objections. Objections and responses shall not exceed twelve pages. The failure to timely object may affect the right to appeal.

DATED this 15th day of March, 2012.



---

BRIAN A. TSUCHIDA  
United States Magistrate Judge